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Supreme Court of the United States

OCTOBER TERM, 1966

No. 427

BREWTON FASHIONS, INC.,
Petitioner,
against
NATIONAL LABOR RELATIONS BOARD,
Respondent.

REPLY BRIEF OF PETITIONER IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI.

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This brief will discuss the various points raised by the reply brief of respondent NATIONAL LABOR RELATIONS BOARD.

ARGUMENT

POINT I.

The Board's discussion of the scope of the applicable order.

In its reply brief the Board contends that its order is sufficiently clear to provide guidance on which the Employer can base its future conduct. To prove this point it states (at n.4 p. 11) what it considers to be the obligations imposed by that order—it "requires the Company to cease its insistence and encouragement to those engaging

in violence and to take appropriate measures to prevent such violence from recurring." We submit that the Board's own characterization of its order proves our contention. In other words, the Board is saying that an order punishable by the sanction of contempt of court is sufficiently clear if it requires a party to take "appropriate measures" to prevent violence. Nowhere either in the opaque order or the opaque characterization is there any guidance as to what measures are "appropriate." If in the future violence recurs at the Brewton plant, the Employer would be faced with the problem of trying to guess what measures are "appropriate", upon the penalty of being adjudged in contempt of court if it is wrong.

The difficulty of interpreting the Board's order is heightened by the conflicting case authority. For example, in *Cross Co.*, 143 NLRB 88 (1963) the Labor Board was satisfied with certain measures taken by that employer to prevent violence in a similar situation. The measures in the *Cross* case in large part parallel the measures taken by the Employer here. But it would be impossible under the present order to determine whether or not the Employer must go beyond the measures held satisfactory in *Cross*. It is equally impossible to determine whether the Employer is entitled to take account of the normal considerations of running a business and maintaining uninterrupted production in deciding what would be an "appropriate" measure.

What places this Employer in such a dilemma is the difficulty of ever knowing what steps should be taken to prevent violence. Today many well-intentioned governors and mayors in this country are faced with similar problems of preventing violence with no indication of which measures will work and which will not. Sometimes

the efforts used are successful in preventing violence, other times they are not. But it would be most unfair to impose a vague and general requirement enforced by contempt of court proceedings to take all "appropriate" steps to prevent future violence. It is obvious that the criteria in such an instance must be better articulated.

Here we are faced with a similar problem. The Board and the Fifth Circuit have recognized the tense feelings in the Brewton plant, but now the Employer is told to hold these feelings in check at the risk of being held in contempt of court. The difficulty of living up to such a standard requires at the very least a complete discussion of this subject by this Court so that the Employer and all others similarly situated will know precisely what their legal obligations are.

POINT II.

The Board's discussion of the law.

The Board's discussion of the holdings of various cases are unsupported by the facts of those cases. In particular, it ignores the unprecedented nature of the decision herein and the authorities contrary to it. Thus it cites four cases as supporting the opinion of the Fifth Circuit, but the examination of these four cases indicates substantially different facts from those here.

In *NLRB* v. *Newton,* 214 F. 2d 472 (5th Cir., 1954) one of the controversial employees was severely beaten up by other employees in the owner's presence while he smiled and applauded. While suffering from severe injuries and in need of medical attention, she was ordered by the plant superintendent either to get back to work or leave the plant. This impossible ultimatum has no analog in this case.

Likewise, in *NLRB* v. *Fred P. Weissman Co.*, 170 F. 2d 952 (6th Cir., 1948), *cert. denied,* 336 U. S. 972 (1949), another case relied on by the Board, it appeared that pro-union employee was evicted by a mob *headed by a supervisor.* Thereafter, after a number of the employees had been prevented from working by groups of anti-union employees, the employer discharged them all upon the pretext that they had voluntarily quit work. This contrasts with the present situation where the Employer tried unsuccessfully on three different occasions to return the evicted employees to their jobs and took numerous other steps to try to get them accepted as co-workers.

NLRB v. *Goodyear Tire and Rubber Co.*, 129 F. 2d 661 (5th Cir., 1942), involved a unique fact situation where the employees involved had been severely beaten in the plant by a small group of fellow employees whose identities were well known, in the presence of approving supervisors. As contrasted with the situation here, that case involved not mass action by virtually all employees, but action by small vigilante groups in a large plant.

In *NLRB* v. *Hudson Motor Car Co.*, 128 F. 2d 528 (6th Cir., 1942), there is no indication that the Employer made any attempt whatsoever to prevent the violence which disrupted its plant. Here it is uncontroverted that the Employer did attempt in many ways to prevent violence.

Hence this is the only case where an employer is found guilty of an unfair labor practice not because he did not act to prevent violence or even actually participated in it, but rather because while the Employer did act, the Board enjoying the benefit of hindsight is dissatisfied with the measures taken. This drastic conclusion finds no support in the authorities.

The Board's discussion of the cases cited in the petition likewise ignores the unprecedented nature of this case. Its listing of cases where the violence was related

to union activities ignores *NLRB* v. *Edinburg Citrus Association,* 147 F. 2d 353 (5th Cir., 1945). It would distinguish ***NLRB* v. *P. R. Mallory & Co.*, 237 F. 2d 437** (7th Cir., 1956) by the fact that the employer therein had no provable animosity toward the union. In other words, the Board would have the law be that once there is friction between an employer and a union, the employer is, by that fact alone, responsible for any acts committed against that union or its adherents and presumably the normal considerations of peacefully operating a plant no longer apply to that employer. The language of *Mallory* quoted at pp. 17-18 of the petition vitiates the contention that an employer is ever the insurer of its employees against possible violence from their fellow employees.

That contention is further discredited by *Porto Mills, Inc.,* 149 NLRB 1454 (1964). It will be recalled that in that case the Board found, as a matter of fact, that the employer had both anti-union animus and knowledge that the violence directed against the employee in that case was based upon her protected activities. Nevertheless the Board there did not find the employer responsible for the violence. Accordingly, we reiterate our statement that the decision of the Fifth Circuit herein is at variance with that of the Seventh Circuit in *Mallory* and the Board itself in *Porto Mills.*

The Board in its brief takes the same view of the case that the Fifth Circuit did—that this is a simple substantial evidence case and there need not be detailed discussion of the applicable law. In that way the Board contends the broad question formulated by the Petition can be avoided. It is precisely the failure to discuss any of the broad issues raised herein that makes the Fifth Circuit opinion so unsatisfying. That court was asked to balance the employees' rights protected by the National Labor Relations Act with the Employer's right to peace-

fully manage its plant. Instead the court refused to discuss that issue clearly presented to it. Its conclusion that there is substantial evidence cannot be meaningful without a discussion of the bounds of the obligation the Company is supposed to have violated. In a difficult situation with no clear precedent for its action, the Fifth Circuit finessed the problem of deciding what the law is by saying the Employer violated it. This leaves in confusion the question of when an employer is responsible for the violence of his employees and whether other unfair labor practices increase an employer's affirmative obligations in this regard. The only way to dissipate the confusion and advise the Employer and others, faced with this problem, of their obligations under the law is for this Court to face the issues of necessity raised by this case and grant the petition herein.

CONCLUSION

For all the reasons stated in the petition herein and in this brief the petition for a writ of certiorari should be granted.

Respectfully submitted,

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